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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Lynae A Cole,

10 Plaintiff,

11 v.

12 United States of America,

13 Defendant.
14

No. CV-21-01636-PHX-DJH

ORDER

15 Pending before the Court is Defendant's Motion to Dismiss (Doc. 7). *Pro se*
16 Plaintiff has not filed a response, and the time to do so has expired. LRCiv 7.2.

17 **I. Plaintiff's Complaint, Removal, and Substitution of Defendant**

18 Plaintiff originally filed this matter in Maricopa County Justice Court.
19 (Doc. 1-4 at 2). The Complaint brought several claims against the sole named Defendant
20 Gordana Milosevic for events that arose at the Phoenix Veterans Affairs ("VA") Medical
21 Center. (*Id.*) Plaintiff generally alleges that Ms. Milosevic made false statements about
22 Plaintiff, which created a hostile work environment and damaged Plaintiff's personal and
23 professional reputation. (*Id.*) Because these false statements were reported to VA
24 management, Plaintiff alleges Ms. Milosevic attempted to defraud the United States
25 Government. (*Id.*)

26 28 U.S.C. § 2679(d)(2) allows the Attorney General to certify that a defendant
27 employee was acting within the scope of employment for the United States at the time of
28 the incident out of which the claim arose, and, if so, any civil action in state court shall be

1 removed to the federal district court. Here, the United States removed this action to this
 2 Court and subsequently certified under 28 U.S.C. § 2679(d)(2) that Ms. Milosevic was
 3 acting within the scope of her employment as a United States employee at the VA.
 4 (Doc. 4).

5 After removal, the United States filed a Notice of Substitution, which substituted the
 6 United States as the Defendant in the place of Ms. Milosevic. (Doc. 6). The basis of the
 7 substitution was the Federal Tort Claims Act, which permits suits against the United States
 8 as the exclusive remedy for tort claims resulting from the wrongful acts of federal
 9 employees performed within the scope of their employment. *See* 28 U.S.C. § 2674. The
 10 United States subsequently filed a motion to dismiss pursuant to Federal Rule of Civil
 11 Procedure 12(b)(1). (Doc. 7).

12 **II. Defendant’s Motion to Dismiss Under Rule 12(b)(1)**

13 A motion made under Rule 12(b)(1) challenges a court’s subject-matter jurisdiction.
 14 Federal district courts presume they do not have jurisdiction, or the power, to hear any
 15 claim. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). It is the
 16 burden of the party asserting jurisdiction to show the court has jurisdiction. *Id.* Here,
 17 Plaintiff has the burden of showing the Court has jurisdiction.

18 The United States argues this Court lacks jurisdiction because Plaintiff failed to
 19 submit an administrative claim and exhaust her administrative remedies. (Doc. 7 at 4).
 20 Under 28 U.S.C. § 2675, a party may not pursue an action against the United States for
 21 money damages resulting from the wrongful act of Government employee unless that party
 22 first presented the claim to the appropriate agency. This is referred to as exhausting the
 23 administrative remedies for a claim. *See D.L. v. Vassilev*, 858 F.3d 1242, 1244 (9th Cir.
 24 2017). Federal district courts have no power to hear claims brought by a party that has
 25 failed to exhaust its administrative remedies. *Id.*

26 As the United States argues, “Plaintiff has not presented anything resembling an
 27 administrative claim to the VA.” (Doc. 7 at 5). Because Plaintiff has not responded to the
 28 United States’ Motion, she fails to carry her burden of showing the Court that it may

1 exercise jurisdiction over this matter. *See Kokkonen*, 511 U.S. at 377. The Court must,
2 therefore, presume that it lacks jurisdiction to hear this matter.

3 **III. Conclusion**

4 In summary, Plaintiff has brought a suit against a United States employee for
5 wrongful conduct that occurred as part of the employee's job. Although it appears Plaintiff
6 intended to sue the employee in her personal capacity, she may not. Her action is properly
7 brought against the United States. But before the Court may hear Plaintiff's claim for
8 money damages against the United States, she must show she first attempted to file a claim
9 with the VA. Because she has not, the Court must grant the United States' Motion to
10 Dismiss and dismiss Plaintiff's Complaint.

11 Plaintiff, if she chooses, may file a first amended complaint.¹ *See Lopez v. Smith*,
12 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc) (holding that a pro se litigant must be given
13 leave to amend her complaint "if it appears at all possible that the plaintiff can correct the
14 defect" in the complaint); Fed. R. Civ. P. 15(a)(2) (leave to amend should be "freely" given
15 "when justice so requires"). Plaintiff should be aware that the Court will summarily
16 dismiss any claim made against Gordana Milosevic for monetary damages as futile. If
17 Plaintiff does not file a first amended complaint on or before January 7, 2022, the Court
18 will dismiss this action.

19 Accordingly,

20 **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss (Doc. 7) is
21 **granted**. Plaintiff's Complaint (Doc. 1-4) shall be dismissed.

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28 ¹ Because Plaintiff is appearing *pro se*, she may information contained within the District's Handbook for Self-Represented Litigants of use. The Handbook is available online at <https://www.azd.uscourts.gov/handbook-self-represented-litigants>.

1 **IT IS FURTHER ORDERED** that Plaintiff may file a first amended complaint no
2 later than January 7, 2022. If Plaintiff does not file a first amended complaint by January
3 7, 2022, the Clerk of Court shall dismiss this action without further order of this Court.

4 Dated this 22nd day of November, 2021.

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8 Honorable Diane J. Humetewa
 United States District Judge
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